

REGISTERED  
TRADE  
MARK

---

Thursday  
August 1, 1991

---

**Part VII**

**Department of  
Transportation**

---

**Research and Special Programs  
Administration**

---

**49 CFR Part 107**

**Amendments to the Hazardous Materials  
Program Procedures; Proposed Rule**

*HM-207A*

**DEPARTMENT OF TRANSPORTATION****Research and Special Programs Administration****49 CFR Part 107****[Docket No. HM-207A; Notice No. 91-2]****RIN 2137-AC05****Amendments to the Hazardous Materials Program Procedures****AGENCY:** Research and Special Programs Administration (RSPA), DOT**ACTION:** Notice of proposed rulemaking

**SUMMARY:** The Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), enacted on November 16, 1990, amended the Hazardous Materials Transportation Act of 1975 (HMTA). Section 4 of the HMTUSA amended section 105 of the HMTA to establish a new preemption standard for State, political subdivision, or Indian tribe requirements that concern certain covered subjects. RSPA is requesting comment on how the new standard should be defined, and is also proposing to streamline the preemption determination and waiver of preemption processes.

**DATES:** Comments must be received on or before September 3, 1991.

**ADDRESSES:** Address comments to the Dockets Unit, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street SW, Washington, DC 20590-0001. Comments should identify the docket and be submitted, if possible, in five copies. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed stamped postcard. The Dockets Unit is located in Room 8419 of the Nassif Building, 400 Seventh Street SW, Washington, DC, telephone (202) 366-5046. The public dockets may be reviewed between the hours of 8:30 a.m. to 5 p.m., Monday through Friday, except holidays.

**FOR FURTHER INFORMATION CONTACT:** Mary M. Crouter, Senior Attorney, Hazardous Materials Safety & Research and Technology Law Division, Office of the Chief Counsel, Research and Special Programs Administration, 400 Seventh Street SW, Washington, DC 20590-0001, telephone (202) 366-4400.

**SUPPLEMENTARY INFORMATION:****I. Background**

The Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA; Pub. L. 101-615) was enacted on November 16, 1990. The HMTUSA amended the Hazardous

Materials Transportation Act (HMTA, 49 App. U.S.C. 1801-1813) in many significant respects. RSPA issued a final rule, published on February 28, 1991 (Docket HM-207, 56 FR 8618), to conform its regulations to comply with certain provisions of the HMTUSA amendments. In that final rule, RSPA stated that further rulemaking would be necessary in some areas.

**II. Covered Subjects**

Section 4 of the HMTUSA amended section 105 of the HMTA by adding new subsections (a)(4) (A) and (B) to preempt any requirement of a State, political subdivision thereof, or Indian tribe concerning the following subjects if the non-Federal requirement is not substantively the same as any provision of the HMTA or any Federal regulation issued under the HMTA:

- (i) The designation, description, and classification of hazardous materials,
- (ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;
- (iii) The preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents,
- (iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials, or
- (v) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials.

49 App. U.S.C. 1804(a)(4) (A) and (B).

In its February 28, 1991 final rule, RSPA added this new preemption standard to § 107.202 to mirror the statute. RSPA stated that it planned to define the standard "substantively the same" in a future rulemaking, and that is one of the purposes of this notice.

**Proposed Definition of "Substantively the Same"**

RSPA is proposing that "substantively the same" be defined as "conforming in every significant respect." Therefore, any State, political subdivision, or Indian tribe law, regulation, order, ruling, provision, or other requirement concerning a covered subject would be considered "substantively the same" as the Federal provision on that subject if the non-Federal requirement conforms in every significant respect to the Federal provision. The following would not be considered significant changes:

- (1) Editorial changes to the text of a Federal provision to reflect the non-

Federal nature of the entity issuing the requirement (e.g., the phrase "Secretary of Transportation" is replaced by a reference to a municipal official responsible for issuing regulations).

(2) Adopting the Federal requirement as non-Federal law (e.g., a State adopts the Hazardous Materials Regulations as State law).

(3) Editorial changes to a Federal provision that do not change the meaning of the Federal provision (e.g., using the definition of a term as opposed to the term itself).

The proposed definition is in accordance with the Department's own experience and with the intent of Congress, as reflected in the two House reports on the bill which became the HMTUSA. Both House Committees expressed support for uniform Federal and State regulation in certain areas, and endorsed the idea that non-Federal laws that are "different from" or are "not the same as" Federal laws on those subjects should be preempted. Both House reports indicated that "de minimis" or "insignificant" amendments or wording changes would not preempt the non-Federal requirement.

A provision concerning preemption of certain covered subjects was included in the Department's own legislative proposal to reauthorize the HMTA. (July 11, 1989 letter from Samuel K. Skinner, Secretary of Transportation, to the Honorable Dan Quayle, President of the Senate.) The Department of Transportation delineated these subject areas as "critical areas of hazardous materials transportation regulation" that should be Federally preempted, unless the non-Federal requirements are "identical" to the Federal requirements.

Congress agreed that these areas should be federally preempted, although the standard for preemption differed among the bills that were considered in the 101st Congress. As reported by the House Committee on Energy and Commerce (Energy Committee), H.R. 3520 would have preempted any non-Federal law concerning a covered subject "which is different from any provision of this Act or any regulation under such provision which concerns such subject."

The Energy Committee stated that the amendments would require "uniform Federal, State, and local laws and regulations in key areas of hazardous materials transportation to promote safety and the free flow of commerce." H.R. Rep. No. 444, Pt. 1, 101st Cong., 2d Sess. 17 (1990).

The Energy Committee also stated that

[The phrase "different from any provision of this Act or any regulation under such provision" is intended to create near-uniformity in Federal and non-Federal laws and requirements relating to the subjects listed in section 105(a)(4)(B). While *de minimis* deviations from Federal regulations under the HMTA may be acceptable, the Committee intends that any significant differences from the HMTA or regulations issued thereunder will cause the non-Federal requirement to be preempted.

H.R. Rep. No. 444, Pt. 1, 101st Cong., 2d Sess. 33 (1990).

As reported by the House Committee on Public Works and Transportation (Public Works Committee), H.R. 3520 would have preempted any non-Federal law concerning a covered subject unless the non-Federal law concerning such subject "is the same as the regulation, rule, or standard issued by the Secretary." The Public Works Committee stated that

There is some concern that this mandate may mean that the state law must mirror the Federal statute verbatim. It does not mean that. It means the state law must have the same effect as the Federal law. For example, a state having adopted the Federal regulations as state law obviously is in concert with this provision. If the state changes the wording of the Federal regulation but not the meaning, the state regulation will stay in effect. However, any state law or regulation mandating something different than the Federal law would be subjected to a preemption challenge.

H.R. Rep. No. 444, Pt. 2, 101st Cong., 2d Sess. 24 (1990).

The Senate bill, as introduced and reported by the Committee on Commerce, Science, and Transportation, did not contain a comparable preemption provision for covered subjects. However, the final version of S. 2936 was the result of a compromise among both House Committees and the Senate Commerce Committee. S. 2936, which was enacted as Public Law 101-615, contained the "substantively the same" preemption standard for the covered subjects. The term "substantively the same" was not defined in the statute or in any report or floor statement prior to enactment.

RSPA has also examined the ordinary meaning of the words "substantive" and "same." The definition of "substantive" is "belonging to the real nature or essential part of a thing; essential." *Webster's Unabridged Dictionary of the English Language*, 1969 ed., 1418. The definition of "same" includes "being one or identical though having different names, aspects, etc.: These are the same rules though differently worded" *Id.*, 1264.

### III. Preemption Determination and Waiver of Preemption Processes

Section 13 of the HMTUSA amended section 112 of the HMTA by adding a new subsection (c) to provide that any person, including a State, political subdivision thereof, or Indian tribe, directly affected by any requirement of a State, political subdivision, or Indian tribe, may apply to the Secretary of Transportation, in accordance with regulations prescribed by the Secretary, for a determination of whether that requirement is preempted by section 105(a)(4) (covered subjects) or section 105(b) (highway routing) or section 112(a) (all other matters under the HMTA).

Section 13 also amended section 112 by adding a new subsection (d) concerning the administrative waiver of preemption provision. The waiver of preemption provision previously contained in the HMTA was amended to clarify that the Secretary has the discretion to waive preemption upon a determination that the statutory criteria have been met. In the final rule issued February 28, 1991, RSPA amended its previous inconsistency ruling and non-preemption determination processes to be consistent with these amendments to the HMTA.

RSPA will exercise the authority to issue preemption determinations and waivers of preemption under the HMTA, with the exception of matters concerning highway routing of hazardous materials. Preemption determinations and waivers of preemption with respect to highway routing, including radioactive materials transportation, will be the responsibility of the Federal Highway Administration. The Federal Highway Administration will be conducting further rulemaking on this issue.

The HMTUSA also amended section 112 to provide that no applicant for an administrative preemption determination may seek relief with respect to the same or substantially the same issue in any court until the Secretary has taken final action or until 180 days after filing of an application, whichever occurs first. The 180-day time limit "is intended to provide sufficient time for the Secretary to make a final determination of preemption based upon the criteria set forth in the bill. Alternatively, if the Secretary fails to act within the 180-day period, the bill seeks to provide the expeditious and definitive resolution of preemption issues by allowing the affected party to proceed with any available judicial remedies." H.R. Rep. No. 444, Pt. 1, 101st Cong., 2d Sess. 49 (1990).

In its February 28, 1991 rule, RSPA included this provision in § 107.203(d). Based upon our experience, RSPA is proposing to shorten the process by eliminating the right to appeal the decision of the Associate Administrator for Hazardous Materials Safety to the Administrator of RSPA. The determination of the Associate Administrator would be the final action of the Secretary, and any party to the preemption determination proceeding could seek judicial review of the decision within 60 days after that decision becomes final.

Under the inconsistency ruling process, the RSPA Administrator generally affirmed the decision of the Director of the Office of Hazardous Materials Transportation (now the Associate Administrator for Hazardous Materials Safety) in every case that was appealed to the Administrator. That experience, coupled with the greater certainty that the statutory preemption standards should provide for the Associate Administrator, leads RSPA to believe that an appellate review at the administrative level is unnecessary.

Although the 180-day time frame applies only to the preemption determination process, RSPA is also proposing to eliminate the appellate review from its waiver of preemption process. RSPA's experience under its non-preemption determination process was that only two applications were filed in the 14 years between 1976 and 1990, and there was only one appeal.

RSPA is also proposing to remove from its preemption determination and waiver of preemption regulations any reference to matters concerning highway routing of hazardous materials. As stated above, the Federal Highway Administration has the responsibility for highway routing matters.

### IV. Notice Concerning Pending Applications for Inconsistency Rulings and Non-Preemption Determinations

In its February 28, 1991 final rule, RSPA converted its procedures for inconsistency rulings and non-preemption determinations to procedures for preemption and waiver of preemption determinations. RSPA still has several open proceedings that were begun under the previous administrative processes. Because of the significant changes to the HMTA since those proceedings were begun, RSPA has determined that each of those proceedings should be reevaluated.

There are five inconsistency ruling proceedings where applications have been filed and public notices and

invitations to comment have been published, but no ruling has been issued.

Docket No	Applicant	Subject
IRA-40C	American Trucking Assns., Inc. (ATA) & Natl Tank Truck Carriers, Inc. (NTTC)	New York City training requirements
IFA-50	City of Watertown, NY	Watertown, NY ordinances and NY State statute re hazardous materials transportation
IRA-51	National Solid Wastes Mgmt. Assn.	Illinois Hazardous Waste Manifest
IRA-52	Tennessee Public Service Comm.	Tennessee statute re transportation of radioactive materials
IRA-53	Nalco Chemical Co	California statute and regulations re flammable and combustible liquids

RSPA has decided to notify the applicants in these proceedings and give them the option of either withdrawing their applications or reapplying for a binding ruling under the new preemption determination process. The other parties to a proceeding will be given an additional opportunity to comment if the applicant reapplies for a binding ruling.

There are also two proceedings where inconsistency ruling applications were filed after November 16, 1990, the effective date of the HMTUSA, but no public notices have been published.

Docket No	Applicant	Subject
RA-54	SPCMA	City of Santa Clara, CA requirements re railroad tank cars
IRA-55	SPCMA	Los Angeles County, CA ordinances re rail tank car loading, unloading, and storage, and related fees

RSPA has decided to notify the applicants in these proceedings and give them the option of either withdrawing their applications or reapplying for a binding ruling under the new preemption determination process.

There are four inconsistency ruling proceedings where rulings have been issued and appeals have been filed, but not decided.

Docket No	Ruling	Applicant	Subject
IFA-40B	IR-23	ATA & NTTC	New York City routing and time restrictions.
IRA-45	IR-28	Yellow Freight System, Inc.	City of San Jose ordinance re haz. materials
IRA-46	IR-32	Chemical Waste Transportation Council	Montevideo, AL ordinance re hazardous waste transportation.
IRA-49	IR-31	State of Louisiana.	LA statutes/regs adopting 49 CFR 171-180 with respect to rail transportation

RSPA has decided that for those proceedings where it is retaining subject matter jurisdiction, it will defer a decision on appeal pending the outcome of this proposed rulemaking on the standard for preemption of certain covered subjects. Applicants and other parties to the proceedings will have a further opportunity to comment if these proceedings are reopened.

There is one pending non-preemption determination proceeding, NPDA-2, concerning New York City permit requirements for certain radioactive materials transportation. In NPDA-2, RSPA issued a ruling (NPD-1; September 12, 1985) and a decision on appeal (December 30, 1986), but the decision was reversed and remanded to RSPA for reconsideration. *City of New York v. DOT*, 700 F. Supp. 1294 (S.D.N.Y. 1988). Because the HMTUSA did not change the standards or the administrative process for issuing waivers of preemption, RSPA will continue to conduct this proceeding.

#### Rulemaking Analyses

#### *Executive Order 12291 and DOT Regulatory Policies and Procedures*

RSPA has determined that this rule is not major under Executive Order 12291 and is not significant under DOT's regulatory policies and procedures. (44 FR 11034, Feb. 26, 1979). This rule will not have any direct or indirect economic impact because it does not alter any existing substantive regulations in such a way as to impose additional burdens. The cost of complying with existing substantive regulations is not being increased. Therefore, preparation of a regulatory evaluation is not warranted.

#### *Executive Order 12612*

The HMTUSA provides that State and local requirements concerning certain

covered subjects are preempted. This notice merely proposes to implement the specific statutory mandate at the minimum level necessary to achieve the objectives of the statute. Therefore, preparation of a Federalism assessment is not warranted.

#### *Regulatory Flexibility Act*

RSPA certifies that this rule will not have a significant economic impact on a substantial number of small entities. There are no direct or indirect economic impacts for small units of government, businesses, or other organizations.

#### *Paperwork Reduction Act*

There are no information collection requirements contained in this rule.

#### *National Environmental Policy Act*

RSPA has concluded that this rule will have no significant impact on the environment and does not require the preparation of an environmental impact statement under the National Environmental Policy Act.

#### List of Subjects in 49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Packaging and containers, Penalties, Reporting and recordkeeping requirements.

In consideration of the foregoing, part 107 of title 49, Code of Federal Regulations, is amended as follows:

#### **PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES**

1. The authority citation for part 107 continues to read as follows:

Authority: 49 App. U.S.C. 1421(c), 49 App. U.S.C. 1653(d), 1655, 49 App. U.S.C. 1802, 1806, 1808-1811, 49 CFR 1.45 and 1.53.

#### **Subpart C—Preemption**

2. In § 107.201, paragraphs (a) and (c) are revised to read as follows:

#### **§ 107.201 Purpose and scope.**

(a) This subpart prescribes procedures by which.

(1) Any person, including a State, political subdivision, or Indian tribe, directly affected by any requirement of a State, political subdivision, or Indian tribe, may apply for a determination as to whether that requirement is preempted under section 105(a)(4) or section 112 (a)(1) or (a)(2) of the Act (49 App. U.S.C. 1804 and 1811), or regulations issued thereunder; and

(2) A State, political subdivision, or Indian tribe may apply for a waiver of preemption with respect to any

requirement that the State, political subdivision, or Indian tribe acknowledges to be preempted by section 105(a)(4) or section 112 (a)(1) or (a)(2) of the Act, or regulations issued thereunder.

(c) For purposes of this subpart, "regulations issued under the Act" means the regulations contained in this subchapter and subchapter C of this chapter.

3. Section 107.202 is amended by adding a new paragraph (d) as follows:

**§ 107.202 Standards for determining preemption.**

(d) For purposes of this section, "substantively the same" means that the non-Federal requirement conforms in every significant respect to the Federal requirement. Editorial and other *de minimis* changes are permitted.

4. In § 107.203, paragraph (a) is revised to read as follows:

**§ 107.203 Application.**

(a) With the exception of highway routing matters covered under section 105(b) of the Act (49 App. U.S.C. 1804), any person, including a State, political subdivision, or Indian tribe, directly affected by any requirement of a State, political subdivision, or Indian tribe,

may apply to the Associate Administrator for Hazardous Materials Safety for a determination of whether that requirement is preempted by 49 CFR 107.202 (a) or (b).

5. In § 107.209, paragraph (c) is revised to read as follows:

**§ 107.209 Determination.**

(c) The determination includes a written statement setting forth the relevant facts and the legal basis for the determination.

**§ 107.211 [Removed]**

6. Section 107.211 is removed and reserved.

7. In § 107.215, paragraph (a) introductory text is revised to read as follows:

**§ 107.215 Application.**

(a) With the exception of requirements preempted under section 105(b) of the Act (49 App. U.S.C. 1804), any State, political subdivision, or Indian tribe may apply to the Associate Administrator for Hazardous Materials Safety for a waiver of preemption with respect to any requirement that the State, political subdivision, or Indian tribe acknowledges to be preempted under the Act or the regulations issued

under the Act. The Associate Administrator may waive preemption with respect to such requirement upon a determination that such requirement—

8. In § 107.221, paragraph (c) is revised to read as follows:

**§ 107.221 Determination and order.**

(c) The order includes a written statement setting forth the relevant facts and the legal basis for the determination.

9. Section 107.223 is revised to read as follows:

**§ 107.223 Timeliness.**

If the Associate Administrator fails to take action on the application within 90 days of serving the notice required by § 107.219(d), the applicant may treat the application as having been denied in all respects.

**§ 107.225 [Removed]**

10. Section 107.225 is removed and reserved.

Issued in Washington, DC, on July 24, 1991 under authority delegated in 49 CFR 1.53.

**Alan I. Roberts,**  
Associate Administrator for Hazardous  
Materials Safety.

[FR Doc. 91-18051 Filed 7-31-91, 8:45 am]  
BILLING CODE 4910-40-M